Supreme Court, U.S.
FILED
SEP 26 1994
OFFICE OF THE CLERK

No. 94-352

In The

Supreme Court of the United States

October Term, 1994

S.W.S. ERECTORS, INC., d/b/a SOUTHWEST SIGNS,

Petitioner,

v.

TRIANGLE SIGN & SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF S.W.S. ERECTORS, INC., d/b/a SOUTHWEST SIGNS

JEFFREY M. KOTZ
ROSOLIO, SILVERMAN, & KOTZ, P.A.
Suite 220, Nottingham Centre
502 Washington Avenue
Towson, MD 21204
410/339-7100

Attorney for Respondent Triangle Sign & Service, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

A. Statement of Facts 1

B. Lower Court Proceedings 2

Summary of Argument 4

Reasons for Denying Certiorari 5

A. Seventh Amendment Argument Not Timely Raised 5

B. Fifth Circuit Properly Applied Supreme Court-Sanctioned Standards for Construction of Special Verdicts 6

1. General Standards 6

2. Application of Standards to the Case at Bar 8

Conclusion 13

Note: The listing of all parent companies and subsidiaries of the parties, required by Rule 29.1 of the Rules of the Supreme Court of the United States, has been included in the Petition for Writ of Certiorari of S.W.S. Erectors, Inc. d/b/a Southwest Signs.

TABLE OF AUTHORITIES

Page

CASES:

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 82 S. Ct. 780 (1962) 4, 6, 7, 13

Braxton v. United States, 111 S. Ct. 1854 (1991) 13

Brooks v. Brattleboro Memorial Hosp., 958 F.2d 525 (2d Cir. 1992) 6

Carvalho v. Raybestos-Manhatten, 794 F.2d 454 (9th Cir. 1986) 11

Cate v. Good Bros., Inc., 181 F.2d 146 (3d Cir.), *cert. denied*, 71 S. Ct. 62 (1950) 11

Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463 (5th Cir. 1993) 10

Cunningham v. Healthco., Inc., 824 F.2d 1448 (5th Cir. 1987) 10

Dreiling v. General Elec. Co., 511 F.2d 768 (5th Cir. 1975) 10

Dunn v. Sears, Roebuck & Co., 639 F.2d 1171 (5th Cir.), *modified*, 645 F.2d 511 (5th Cir. 1981) 7

Gallick v. Baltimore & Ohio Railroad Co., 83 S. Ct. 659 (1963) 4, 7, 13

Garcia v. Murphy Pacific Marine Salvaging Co., 476 F.2d 303 (5th Cir. 1973) 7

Heller v. Doe by Doe, 113 S. Ct. 2637 (1993) 5

McGuire v. Russell Miller, Inc., 1 F.3d 1306 (2d Cir. 1993) 7

Midwestern Wholesale Drug, Inc. v. Gas Service Co., 442 F.2d 663 (10th Cir. 1971) 10

TABLE OF AUTHORITIES – Continued

Page

Nimnicht v. Dick Evans, Inc., 477 F.2d 133 (5th Cir. 1973) (per curiam) 12

Patrick v. Burget, 108 S. Ct. 1658 (1988) 5

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989), *cert. denied*, 490 U.S. 1051 (1989) 7, 12

Toner v. Lederle Lab., 828 F.2d 510 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1122 (1988) 7

Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329 (7th Cir. 1985) 10, 11

United States v. Williams, 112 S. Ct. 1735 (1992) 5

RULES AND CONSTITUTIONS:

Fed. R. Civ. P. 49 ..... 3, 5, 13

Sup. Ct. R. 10.1(a) 4

Sup. Ct. R. 29.1 i

U.S. Const. amend. VII 3, 4, 5, 6, 7, 8

STATEMENT OF THE CASE

A. Statement of the Facts

Triangle Sign & Service ("Triangle") was hired by INFAX, Incorporated ("INFAX") to fabricate and install signage in connection with the construction of the International Airlines Building at the Houston Intercontinental Airport (the "Project"). In turn, Triangle hired several subcontractors including S.W.S. Erectors, Inc. d/b/a Southwest Signs ("Southwest Signs"). Triangle and Southwest Signs entered into a written subcontract agreement dated May 4, 1990 wherein Southwest Signs agreed to perform certain signage work on the Project for a price certain. As Southwest Signs had substantially completed its work on the Project by July 1990 and received the majority of the agreed contract payment for such services, Triangle understood the only outstanding issues were the amount of retainage owed under the Subcontract Agreement and payment for certain approved extra services and goods. However in late August 1990, Triangle received from Southwest Signs a series of invoices for additional charges. These additional charges along with the retainage owed brought the total amount claimed by Southwest Signs to almost $67,000.00.

As most of the claimed additional charges involved work covered by the terms of the Subcontract Agreement between the parties, Triangle offered to pay Southwest Signs $17,115.00. This amount consisted of $8,008.64 for the retainage and $9,106.36 for approved additional work not covered by the Subcontract Agreement. These monies were not yet due under the terms of the Subcontract

Agreement as Southwest Signs had not furnished to Triangle the release, required by the contract, of any potential claims against the City of Houston (the "owner" of the airport) and INFAX (the general contractor for the Project).

Contrary to the allegations contained in Petitioner's Petition for Writ of Certiorari, Triangle did not "admit[ ] liability on the written contract" nor "contend[ ] it was excused[1] from performance because Southwest Signs had not supplied certain releases." As noted above, Triangle's performance under the contract was not yet required as Southwest Signs had not yet fulfilled the condition precedent for such performance. Triangle was *willing* to pay for work performed by Southwest Signs that 1) was not covered by the written Subcontract Agreement and 2) had been requested and approved by Triangle. Triangle was *unwilling* to pay additional sums for work included in the price bid by Southwest Signs and incorporated into the amount due under the Subcontract Agreement and for extra work caused solely by Southwest Signs' failure to perform the original work in a good and workmanlike manner.

B. LOWER COURT PROCEEDINGS

In response to Triangle's offer to pay $17,115.00 upon receipt of the contractually-mandated releases, Southwest

---

[1] The Texas Pattern Jury Charge adopts the term "excused" to encompass various affirmative defenses to an alleged breach of contract. As the breach of contract claim raised by Southwest Signs was governed by Texas law, the trial court adapted the language of the state pattern jury charges into its jury charge.

Signs filed suit for breach of contract in the United States District Court for the Southern District of Texas, Galveston Division. The case was tried to a jury in August 1992. Pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the District Court submitted the case to the jury by means of special interrogatories. Construing the jury's answers to the special interrogatories, the District Court concluded that Triangle had not breached the Subcontract Agreement and that, even though an oral agreement existed and Triangle had breached it, such breach was excused. The District Court, therefore, rendered a "take nothing" judgment against Southwest Signs. Southwest Signs appealed this judgment to the Fifth Circuit Court of Appeals. The Fifth Circuit modified the judgment and, as modified, affirmed the judgment.[2]

Southwest Signs seeks a writ of certiorari on two questions. The first question regards the proper formation and construction of interrogatories under Rule 49(a) of the Federal Rules of Civil Procedure. The basis for the second question is the claim by Southwest Signs that its Seventh Amendment right to trial by jury has been derogated as a result of entry of a judgment allegedly based on irreconcilable special verdicts.

---

[2] The modifications mandated by the Fifth Circuit have not been raised as error in the Petition for Writ of Certiorari. They are, therefore, not addressed in this Brief in Opposition.

SUMMARY OF ARGUMENT

Denial of Southwest Sign's Petition for Writ of Certiorari is proper as this case does not present "special and important reasons" justifying its consideration by the Supreme Court. First, Southwest Signs failed to present its argument that its Seventh Amendment right to trial by jury was derogated to the Fifth Circuit in a timely fashion. As a result, the Court does not have the benefit of the Fifth Circuit's consideration and analysis of this issue.

Second, Southwest Signs seeks a writ of certiorari claiming that the actions and opinions of the Court of Appeals for the Fifth Circuit have "departed so far from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court" to call for the granting of the writ of certiorari on this ground. Sup. Ct. R. 10.1(a). *See* Petition for Writ of Certiorari, at 15. No evidence has been presented to support this serious allegation. As will be shown below, the Fifth Circuit soundly applied the well-settled standards for analysis of cases involving special verdicts in which a claim of ambiguity or inconsistency is raised. As such this case does not require the exercise of the Supreme Court's power of supervision.

Finally, the Court has previously construed the scope of Rule 49 of the Federal Rules of Civil Procedure. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 82 S. Ct. 780, 786 (1962). *See also Gallick v. Baltimore & Ohio Railroad Co.*, 83 S. Ct. 659, 666 (1963) (construing role of appellate courts when faced with judgment based on interrogatories to the jury). The Courts of Appeal are uniformly applying the standards delineated by this Court when

faced with issues involving the construction and application of Rule 49. Therefore Triangle urges this Court to deny the petition for writ of certiorari submitted by Southwest Signs.

REASONS FOR DENYING CERTIORARI

A. SEVENTH AMENDMENT ARGUMENT NOT TIMELY RAISED

The Supreme Court has repeatedly recognized the importance and benefits of initial consideration by the courts of appeal of issues on which Supreme Court review is sought. *See United States v. Williams*, 112 S. Ct. 1735, 1738-41 (1992). For this reason, the Court does not normally choose to review questions that have not been addressed by the lower courts. *See, e.g., Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993); *Patrick v. Burget*, 108 S. Ct. 1658, 1662 n.5 (1988).

The Fifth Circuit did not address the argument belatedly advanced by Southwest Signs that the construction of the jury verdict resulted in a denial of its Seventh Amendment right to trial by jury. This omission is due to the fact that Southwest Signs did not include this argument in either its brief or its reply brief filed with the Fifth Circuit. The contention was first raised in passing in the petition for rehearing filed by Southwest Signs. Even at that late date, no argument was included. Southwest Signs merely ended its petition for rehearing with the conclusory remark that failure "to give effect to the response to interrogatory number five is to deny this party of the right to trial by jury, by denying the benefit

of the jury's response to special interrogatory five." No further analysis or explanation was offered to the Fifth Circuit.

Southwest Signs has not offered any explanation to this Court for its failure to present its Seventh Amendment argument fully and timely to the court of appeals. Indeed there is no excuse for the petitioner's failure to do so. As Southwest Signs has chosen to prosecute its case in a fashion which denies this Court the benefit of full review and analysis of all issues by the lower courts, Triangle respectfully urges this Court to deny the petition for writ of certiorari on the question of the alleged impact of the jury's verdict on the Seventh Amendment rights of Southwest Signs.

B. FIFTH CIRCUIT PROPERLY APPLIED SUPREME COURT-SANCTIONED STANDARDS FOR CONSTRUCTION OF SPECIAL VERDICTS

1. General Standard

"Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved in that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 82 S. Ct. 780, 786 (1962). Thus, it is the duty of the reviewing court to adopt a view of the case, if there is one, that resolves any seeming inconsistency in the jury's answers. *Brooks v. Brattleboro Memorial Hosp.*, 958 F.2d 525, 529 (2d Cir. 1992).

To do this the district court must reconcile the jury's answers with any reasonable theory consistent with the

evidence, and attempt to harmonize the answers if possible under a fair reading of those answers. *Gallick v. Baltimore & Ohio R.R.*, 83 S. Ct. 659, 666 (1963). The court must search for a reasonable way to read the verdict as expressing a coherent view of the case, *Toner v. Lederle Lab.*, 828 F.2d 510, 513 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1122 (1988), and must reconcile the jury's findings, "by exegesis if necessary before [it is] free to disregard the jury's special verdict." *Gallick*, 83 S. Ct. at 666 (citations omitted). *See generally McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1311 (2d Cir. 1993).

The courts have held that if these standards are followed there is no violation of the Seventh Amendment. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 82 S. Ct. 780, 783 (1962) (court of appeals disregarded jury's answer to interrogatory and reversed judgment in favor of employer; Court reversed as jury's verdict was not inconsistent and jury was properly charged); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989), *cert. denied*, 490 U.S. 1051 (1989) (Seventh Amendment mandates judgment be entered in accordance with a view of the case which makes the jury's answers consistent, if such is possible); *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1174-1175 (5th Cir.), *modified*, 645 F.2d 511 (5th Cir. 1981) (court refuses to overturn judgment for defendant, as seventh amendment forbids appellate judges to sit as post-trial assessors and denies them power to vacate awards); *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303, 306 (5th Cir. 1973) (court refuses to overturn jury's finding of no negligence and no unseaworthiness as facts were in dispute and

Seventh Amendment forbids the appellate courts from redetermining facts found by the jury).

2. Application of Standards to the Case at Bar

In this case, the jury found that Triangle did not breach the written agreement between the parties.[3] It also found that an oral agreement existed between the parties, which Triangle was found to have breached.[4] However the jury found that Triangle's breach of the oral

---

[3] Interrogatory No. 1:
Do you find from a preponderance of the evidence that Defendant Triangle Sign & Service, Inc. failed to pay Plaintiff S.W.S. Erectors, Inc. d/b/a Southwest Signs, in accordance with the May 4, 1990 Subcontract Agreement, including the accompanying plans and written Change Orders? Answer "Yes" or "No".
Answer: No

[4] Interrogatory No. 2:
Do you find from a preponderance of the evidence that Defendant Triangle Sign & Service, Inc. agreed to pay for additional work which was not included in the May 4, 1990 Subcontract Agreement, etc., and which was done pursuant to additional, oral Change Orders? Answer "Yes" or "No".
Answer: Yes

If you have answered Interrogatory No. 2 "Yes", then answer Interrogatory No. 3. Otherwise, do not answer Interrogatory No. 3.

Interrogatory No. 3:
Do you find from a preponderance of the evidence that Defendant failed to comply with the agreement by failing to pay Plaintiff for the work performed on such additional, oral Change Orders? Answer "Yes" or "No".
Answer: Yes

agreement was excused.[5] Southwest Signs argues that interrogatory four is fatally ambiguous because it required the jury to address in a single interrogatory the validity of Triangle's affirmative defenses to the written agreement "and/or" the oral agreement. Southwest Signs cites as support of its position the fact that the jury found damages in favor of Southwest Signs in response to interrogatory five.[6]

Merely framing an interrogatory in the alternative does not result in a fatal ambiguity in the special verdict

---

[5] *If you have answered Interrogatory No. 1 "Yes", or Interrogatories Nos. 2 and 3 "Yes", then answer Interrogatory No. 4. Otherwise, do not answer Interrogatory No. 4.*

Interrogatory No. 4:

Do you find from a preponderance of the evidence that Defendant Triangle Sign & Service, Inc.'s failure, if any, to comply with the May 4, 1990 Subcontract Agreement, etc., and/or the oral agreement to pay for additional work are "excused"? Answer "Yes" or "No".

Answer: Yes

[6] *If you answered Interrogatory No. 1 "Yes", or Interrogatories Nos. 2 and 3 "Yes", then answer Interrogatory No. 5. Otherwise do not answer Interrogatory No. 5.*

Interrogatory No. 5:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff S.W.S. Erectors, Inc. for its damages, if any, that resulted from failure, if any, of Defendant Triangle Sign & Service, Inc. to pay S.W.S. Erectors in accordance with the Subcontract Agreement, etc., and/or the oral agreement to pay for additional work.

Consider only the amount, if any, Triangle Sign & Service, Inc. agreed to pay S.W.S. Erectors, Inc. under the terms of the Contract, or subsequent oral agreement. Do not consider other elements of damages, if any.

Do not include any amount for interest on past damages, if any. Answer in dollars and cents.

Answer: $23,031

form. *See Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 1338 (7th Cir. 1985). The question to be answered by the reviewing court is whether the charge when read as a whole adequately and fairly presented the contested issues to the jury. *Dreiling v. General Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975). The trial court does not abuse its discretion nor commit error in combining contested issues provided the questions posed to the jury were clear and not confusing. *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1474 (5th Cir. 1993) (approving interrogatory combining the various affirmative defenses of multiple defendants as it adequately presented contested issues to the jury); *Midwestern Wholesale Drug, Inc. v. Gas Service Co.*, 442 F.2d 663, 666 (10th Cir. 1971) (approving interrogatory combining questions of negligence and proximate cause). Moreover the submission of potentially conflicting issues to a jury on alternative theories is not error because, until those issues are answered no conflict can exist. *Cunningham v. Healthco., Inc.*, 824 F.2d 1448, 1465 (5th Cir. 1987).

The Fifth Circuit held that the interrogatories, including the precatory instructions, submitted to the jury in this case met the requisite standards. The precatory instructions to interrogatory four, given that the jury had answered "No" to interrogatory one, resulted in limiting the scope of interrogatory four to the oral contract. Because interrogatory four was framed in the alternative, a consistent explanation of the jury's verdict is that the jury found no breach of the written contract and thus answered "no" to interrogatory one while it did find an affirmative defense for the breach of the oral agreement and thus answered "yes" to interrogatory four.

For these reasons, the Fifth Circuit correctly found that any potential ambiguity had been pretermitted. Opinion of the Court of Appeals, App. 16. See *Twin Disc, Inc.*, 772 F.2d at 1338 wherein the Seventh Circuit was faced with a similar argument and applied the standards in the same method as the Fifth Circuit in this case. Under these circumstances, no ambiguity could have materialized and it was proper for the trial court to give full effect to the jury's answer to interrogatory four by entering a take nothing judgment against Southwest Signs.

Southwest Signs argues that there is a fatal conflict between interrogatory four, wherein the jury excused any breach by Triangle and interrogatory five, wherein the jury found that Southwest Signs suffered damages. The basis for this argument is the assumption that the jury knew the legal impact of its answer to interrogatory four. The jury did not receive any instructions on the impact of its answers in this case nor was the trial court required to provide such instructions. One of the purposes of Rule 49 of the Federal Rules of Civil Procedure was to prevent the jury's view of the correct result from interfering with its factual findings. *Carvalho v. Raybestos-Manhatten*, 794 F.2d 454, 457 n.2 (9th Cir. 1986). The trial judge has the responsibility of applying the appropriate legal principles to the facts found by the jury. *Cate v. Good Bros., Inc.*, 181 F.2d 146, 149 (3d Cir.), *cert. denied*, 71 S. Ct. 62 (1950).

If one assumes that the jury simply decided the factual issues in accordance with its instructions,[7] no conflict

---

[7] Indeed to assume anything else would be improper, particularly when there is no indication that the jury did anything

exists between the answers to interrogatory four and interrogatory five. The jury's answer to interrogatory five quantifies the amount of Southwest Signs' loss resulting from Triangle's failure to comply with the oral agreement. As interrogatory one was answered "no," the precatory instructions to interrogatory five limits the jury's quantification of loss to the oral contract. It is the law that prohibits Southwest Signs from recovering those damages as a result of the affirmative defenses raised by Triangle. *E.g., Nimnicht v. Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973) (per curiam) (fact that jury answered damage question "could not change the answers to the prerequisite questions upon which any damages at all had to live or die.")

As the Fifth Circuit concluded in its opinion, the jury's response to interrogatory five is "merely harmless surplusage." Opinion of Court of Appeals, App. 13. The fact that the jury dutifully answered interrogatory five in accordance with the court's instructions cannot change the legal impact of the jury's answer to interrogatory four. Southwest Signs failed to prove by a preponderance of the evidence that Triangle breached the written contract between the parties. Triangle successfully carried its burden of proof on its affirmative defenses to the breach of the oral agreement. Under these circumstances, the law denies Southwest Signs any recovery in this case.

---

other than follow its instructions and answer the special interrogatories. *Robles*, 862 F.2d at 1204.

CONCLUSION

A principal purpose for the Court's exercise of certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeal concerning the meaning of provisions of federal law. *Braxton v. United States,* 111 S. Ct. 1854, 1857 (1991). That purpose would not be met by granting the petition for writ of certiorari in this case. The Circuit Courts of Appeal are in agreement on the standards and analysis to be applied when faced with the question of the propriety of Rule 49(a) special verdicts. Moreover, these standards were derived from the opinions of this Court. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 82 S. Ct. 780, 786 (1962); *Gallick v. Baltimore & Ohio Railroad Co.,* 83 S. Ct. 659, 666 (1963).

The Fifth Circuit diligently applied these recognized standards in reaching its opinion in this case. The fact that Southwest Signs disagrees with the result does not mean that the Court of Appeals "significantly departed from the accepted and usual course of judicial proceedings." Southwest Signs has presented this Court with no evidence to support its contention that the actions of the lower courts in this case mandate the exercise of the Court's power of supervision. Additionally Southwest Signs has, by its failure to raise the argument in a timely fashion, denied this Court the benefit of the lower courts' review and analysis of its belated claim that its Seventh Amendment rights have been violated in this case. For these reasons, Respondent Triangle Sign & Service

respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Southwest Signs.

Respectfully submitted,

JEFFREY M. KOTZ
ROSOLIO, SILVERMAN, & KOTZ, P.A.
Suite 220, Nottingham Centre
502 Washington Avenue
Towson, MD 21204
410/339-7100